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No. 81-70

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WHIRLPOOL CORPORATION,

Petitioner,

vs.

COLOMBO A. SPAGNUOLO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHARLES J. GRIFFIN, JR.
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

Attorney for Petitioner

Of Counsel:

BRADFORD L. LIVINGSTON
KATHRYN S. MUELLER
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

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QUESTIONS PRESENTED

Whether the Fourth Circuit erred in concluding that the District Court properly refused to instruct the jury that the articulation of a legitimate, nondiscriminatory reason for Respondent's demotion negated any inference of age discrimination unless the jury also found that the stated explanation was pretextual.

Whether the Fourth Circuit erred in determining the degree of causation to be applied in an age discrimination case where more than one reason may have prompted an employment decision.

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IN THE

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OCTOBER TERM, 1981

No. .....

WHIRLPOOL CORPORATION,

Petitioner,

v.

COLOMBO A. SPAGNUOLO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Whirlpool Corporation,[1] prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this case on February 26, 1981, and the denial of a Petition for Rehearing entered on May 6, 1981.

[1] Pursuant to Rule 28.1 of the Rules of the Court, the following is a listing naming all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of Petitioner Whirlpool Corporation: Brastemp S.A. (Sao Paulo, Brazil); Consul S.A. (Joinville, Brazil); Embraco, S.A. (Joinville, Brazil); Inglis, Limited (Toronto, Canada).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 641 F.2d 1109 and is reproduced herein as Appendix A. A Petition for Rehearing was denied by the Court of Appeals and that unreported decision is reproduced herein as Appendix B. The judgment of the District Court is unreported and is reproduced herein as Appendix C.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on February 26, 1981 (Appendix A). A Petition for rehearing was denied on May 6, 1981 (Appendix B). This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are relevant portions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§623(a) and (f) (hereinafter referred to as the "ADEA") and are reproduced in Appendix D.

STATEMENT OF THE CASE

The instant case is an individual action brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621 *et seq.* In it, the Respondent herein, Colombo A. Spagnuolo (hereinafter "Spagnuolo" or "Respondent") claimed his demotion from Builder Sales Manager of Petitioner Whirlpool Corporation's Charlotte, North Carolina sales branch to a position as a salesman of Whirlpool products was the result of age discrimination.

The general circumstances surrounding Spagnuolo's demotion are not in dispute. In an attempt to reverse continuing losses generated by its Sales Division, Whirlpool, commencing in 1975, undertook a nationwide reduction of management positions at its sales facilities. The consolidation process commenced in the Charlotte Sales office in the latter part of 1976 and culminated in the decision to eliminate three different managerial positions at that facility—the last by combining the positions of Builder Sales Manager and Heating and Cooling Sales Manager. The incumbents in those positions—Respondent and Daniel Brattain, respectively—were evaluated by Whirlpool's corporate director of sales, who ultimately selected Brattain to fill the consolidated position. At the time the decision was made, Brattain was forty years of age, while Spagnuolo was fifty-three.

Brattain's performance record as Heating and Cooling Sales Manager was far superior to that of the Respondent.[2] In addition, Brattain, a licensed engineer, had the significant technical expertise necessary for the "heating and cooling" aspect of the consolidated Sales Manager function; Respondent had no similar experience or training.

The consolidation of the Builder Sales Manager and Heating and Cooling Sales Manager positions was effected November 9, 1977; Brattain at the time assumed the duties of the consolidated position while the Respondent began

[2] The Heating and Cooling Sales Manager was responsible for selling sophisticated, custom-made heating and cooling systems to commercial and industrial firms. On the other hand, "builder" sales were generally of prepackaged appliances to be installed in new homes and thus required no technical expertise.

working in a sales position.[3] However, less than two months later, on January 4, 1978, Respondent resigned from employment with the Petitioner and immediately commenced working in an equivalent sales position for one of Whirlpool's direct competitors.

Respondent thereafter filed a charge of age discrimination and instituted an action in federal district court alleging a violation of the ADEA, 29 U.S.C. § 626(c). After a four day jury trial, the jury found in the Respondent's favor. Judgment was entered entitling Spagnuolo to back pay, liquidated damages, reinstatement to a managerial position in the Charlotte sales office, front pay until such reinstatement was effected, costs, attorneys' fees, and prejudgment interest on the monetary award.

Whirlpool appealed the judgment of the District Court, alleging *inter alia*, that the jury had been improperly instructed upon the allocation and order of proof in a case under the ADEA. On appeal, the Court of Appeals for the Fourth Circuit, Judge Field dissenting, affirmed the District Court's judgment in all respects relevant to the instant petition.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. The Fourth Circuit's Decision Regarding the Order of Proof is in Conflict With the Prior Decisions of this Court and Other Courts of Appeals

In dissenting from the Fourth Circuit's decision affirming the judgment for the Respondent, Senior Circuit Judge Field warned:

> This case, which I fear is one of the first of many, portends serious problems for employers in this cir-

[3] While the consolidation decision was made several months earlier, implementation was delayed until a vacancy in the Charlotte sales branch occurred.

> cuit, for to me, the caveat is clear that any management reorganization which adversely affects an employee within the age bracket of forty to seventy years will expose the employer to a costly and disruptive law suit. In my opinion, legitimate and nondiscriminatory personnel decisions can be protected in such a case only by adherence to the orderly presentation of proof and even handed instructions to the jury....

641 F.2d at 1115; Appendix A, p. A-11-12.

Judge Field's justifiable concerns in this regard are premised on the "district court's failure to follow the basic format of proof under [*McDonnell Douglas* v. *Green*, 411 U.S. 792 [1973]]" 641 F.2d at 1116. The lower court's "complete departure" from the "sensible and orderly presentation of evidence" dictated by that decision, in Judge Field's analysis, "made it extremely difficult for the jury to intelligently appraise the evidence in light of the issues before it," and thus mandated a new trial. 641 F.2d at 1115.

In *McDonnell Douglas*—an individual Title VII action alleging a discriminatory refusal to hire—this Court made it clear that the plaintiff in an action alleging unlawful employment discrimination is charged with making a *prima facie* showing of unlawful conduct. 411 U.S. at 802. Where such a *prima facie* case has been made, the burden of production then—and only then—shifts to the employer defendant, who must "articulate" a "legitimate, nondiscriminatory reason" for the challenged employment action. Upon such an "articulation," the burden is shifted back to the plaintiff, who must then establish by a preponderance of the evidence that the employer's proffered explanation for its conduct was a mere pretext for prohibited discrimination. *McDonnell Douglas, id.* at 804.

In subsequent decisions, this Court has repeatedly—and unequivocally—indicated that it meant what it said in

McDonnell Douglas; namely, that the burden of establishing unlawful employment discrimination rests with the plaintiff, and that the employer is under no duty to affirmatively prove the lawfulness of its actions. In *Furnco Construction Corporation* v. *Waters*, 438 U.S. 567 (1978), the Court reversed a Court of Appeals decision which, in effect, equated a *prima facie* showing with an ultimate finding of discrimination. In so doing, the Court explained the rationale underlying the *McDonnell Douglas* formulation of a *prima facie* case:

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. . . . And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

438 U.S. at 577 (Citations omitted; Emphasis in original).

Thus, under *Furnco*, the establishment of a *prima facie* case in a Title VII action does no more than rebut the natural presumption that the motivations underlying a given employment action were lawful and legitimate—a presumption that is revived upon the employer's articulation of a legitimate reason for its conduct. In the absence of a showing by the plaintiff that this reason was, in fact, merely a pretext for prohibited discrimination, the pre-

sumption of lawfulness remains undispelled and no Title VII violation may be found.

In *Board of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24 (1978), the Court further clarified the essence of the employer's burden in a Title VII action. Reversing a First Circuit decision which interpreted *McDonnell Douglas* as requiring the employer to *prove* the absence of discriminatory motive, the court noted that there was a "significant distinction between merely 'articulat[ing] some legitimate, nondiscriminatory reason' and 'proving absence of a discriminatory motive.' " 439 U.S. at 25. Stressing that the former would suffice to meet a *prima facie* case under Title VII, the Court vacated the First Circuit decision.

Finally, in the recent decision in *Texas Department of Community Affairs* v. *Burdine*, U.S. , 101 S.Ct. 1089 (1981), this Court again vacated a Court of Appeals decision that required the employer, in the absence of any evidence of pretext, to introduce evidence "which would persuade the trier of fact that the employment action was lawful." In so doing, the Court once again emphasized that a Title VII plaintiff retained the ultimate burden of proving discrimination. It further held that this burden, in the face of the employer's articulation of a lawful reason for its conduct, could only be met "directly by persuading the [finder of fact] that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 101 S.Ct. at 1095.

Since the prohibitions of the ADEA were derived "in *haec verba* from Title VII,"[4] the Courts of Appeals have

[4] *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978).

relied upon the *McDonnell Douglas* standards and order of proof in ADEA disparate treatment cases.[5] *Loeb* v. *Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979); *Stanojev* v. *Ebasco Services, Inc.*, 643 F.2d 914 (2nd Cir. 1981); *Smithers* v. *Bailar*, 629 F.2d 892 (3rd Cir. 1980); *Smith* v. *University of North Carolina*, 632 F.2d 316 (4th Cir. 1980); *Marshall* v. *Sun Oil Co.*, 605 F.2d 1331 (5th Cir. 1979); *Kephart* v. *Institute of Gas Technology*, 630 F.2d 1217 (7th Cir. 1980), *cert. denied*, U.S. , 101 S.Ct. 1418 (1981); *Kenroti* v. *Frontier Airlines, Inc.*, 585 F.2d 967 (10th Cir. 1978).

In the instant case, the trial court failed to adhere to the *McDonnell Douglas* framework in its most critical aspect: it refused to instruct the jury that Whirlpool's articulation of a legitimate reason for the Respondent's demotion dispelled any inference of discrimination unless the jury also found that the proffered reason was a pretext.[6]

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[5] It should also be noted, however, that the wholesale applicability of Title VII standards to ADEA actions is not intuitively appropriate due to the fact that age is not an immutable characteristic such as race, sex, or national origin. Moreover, and as this court has itself noted, "[T]he aged in this Nation . . . have not experienced a 'history of purposeful unequal treatment' " that characterizes the individuals protected by Title VII. *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 313 (1976). *Accord, Laugesen* v. *Anaconda Company*, 510 F.2d 307, 313 (6th Cir. 1975).

[6] The trial court proceedings on this point were as follows:

> [Whirlpool counsel]: The second part of my objection on this would be a proposal on page 6 of the [Defendant's] instructions. . . . Whirlpool must merely articulate or state a legitimate nondiscriminatory reason or explanation for the demotion of Spagnuolo and its refusal to give him the Charlotte territory. This is, of course, the Supreme Court's decision in the college case in New Hampshire. I believe the same law would apply under the Age Act.
>
> COURT: I think it's more than articulate a reason. The jury has to determine that age played no part in the decision.

By thus failing to instruct the jury on the legal impact of the employer's presentation of a non-discriminatory basis for the demotion, the trial court misapplied the relevant standards in the same manner rejected by this Court in both *Sweeney* and *Burdine*—it effectively required Whirlpool to prove that its demotion of the Respondent was justified. Indeed, the trial court's failure to instruct on the Plaintiff's burden to establish pretext shifted to Whirlpool the burden of proving not only that its decision was justified by legitimate business reasons, but also that such reasons outweighed any considerations of age purportedly involved in Respondent's demotion.

This erroneous view of the requirements of *McDonnell Douglas* was specifically approved by the Fourth Circuit on appeal. That court held *McDonnell Douglas* standards to be inapplicable in cases where the plaintiff did not rely on statistics or other inferential proof to establish discrimination. 641 F.2d at 1112-13. While the Fourth Circuit endeavored to rely on the First Circuit decision in *Loeb* v. *Textron, Inc.*, in reaching this conclusion, the majority's argument in this regard ignores the *Loeb* court's explicit instructions "that the reason for the discharge assigned by the employer . . . dispels any inference the discharge was improper unless the jury finds it to have been a pretext, *i.e.*, a cover-up for age discrimination." 600 F.2d at 1018.

In point of fact, the use of "direct" evidence of discrimination neither dictates nor justifies the abandonment of the well-established schemes of production and proof in discrimination actions; rather, it simply eliminates the necessity of establishing every element of a *prima facie* case under *McDonnell Douglas*. *Furnco Construction Corp* v. *Waters*, 438 U.S. at 577 (reprinted *supra* at p. 7); *Stanojev* v. *Ebasco Services, Inc.*, 643 F.2d at 920-21. The Fourth Circuit's decision thus not only disregards the clear direc-

tive of *Furnco*, it misconstrues the First Circuit's holding in *Loeb* and runs directly contrary to the Second Circuit's decision in *Stanojev*.

The mischief that could result from adoption of the Fourth Circuit's rationale is readily apparent. If an ADEA plaintiff is not charged with proving that an employer's explanation for an employment decision is pretextual, the jury would be left to decide which motive for an employment decision was stronger—age considerations or legitimate business reasons—even if business reasons alone justified the employer's actions. A jury thus left to its own subjective and misguided deliberations, could permissibly find an ADEA violation even where the employer's actions were premised upon and objectively warranted by valid business reasons.

The ill-advised nature of the Fourth Circuit's burden of proof schema is further heightened by the fact that the finder of fact in ADEA actions is most often not the trial judge, whose findings of fact and conclusions of law would be clearly enunciated and easily susceptible of review, but rather a jury of laymen whose deliberations are highly subjective and largely immune from scrutiny. Such being the case, the need for adherence to a "sensible, orderly way to evaluate the evidence"[7] is all the more critical, as it serves both to aid the judge in determining whether there is an issue of fact to be decided by the jury, and to help the jury to concentrate on the "elusive factual question of intentional discrimination."[8]

The facts of the instant case are virtually identical to those considered by this court in *Burdine*. In both cases,

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[7] *Furnco*, 438 U.S. at 577.

[8] *See Burdine*, U.S. , 101 S.Ct. at 1094, n. 8.

management consolidation programs adversely affected the employment status of an over-forty employee; in both cases, the challenged employment decisions were based on performance evaluations and reports submitted by other company personnel. Such being the case, the District Court's refusal to instruct the jury on the significance of Whirlpool's explanation of its action here is no less erroneous than the failure of the Fifth Circuit in *Burdine* to credit the proffered "rational" basis for the employment decision at issue there.

As this Court stated in *Burdine*, "We remain confident that the *McDonnell Douglas* framework permits the plaintiff meriting relief to demonstrate intentional discrimination." 101 S.Ct. at 1096. The Fourth Circuit's ruling, if permitted to stand, would create a new standard for employers defending against age discrimination claims—a standard which is contrary to that set forth by this Court and applied by other Courts of Appeals.[9]

II. The Standard of Causation Required by the Court of Appeals to Justify a Finding of Age Discrimination in Conflict with that of Other Circuits

Unlike Title VII, the ADEA specifically provides that an employment action based on "reasonable factors other than age" is not violative of the Act. 29 U.S.C. § 623(f)(1). Thus, a critical threshold question under the ADEA concerns the extent to which age must contribute to a given employment action in order to raise the spectre of liability. The Courts of Appeals have developed numerous and disparate theories of causation in this regard, variously finding unlawful age discrimination where age is "a factor," "a factor that made

[9] Indeed, the Fourth Circuit's decision herein has already been the subject of some significant criticism. *See* Note, 5 *Equal Employer* ¶ 124 (June 15, 1981).

a difference," a "substantial or motivating factor," or a "determinative factor."

The leading case on this subject is *Loeb* v. *Textron, Inc., supra,* in which the First Circuit, rejecting a proposed jury instruction which would allow the plaintiff to recover if age were proven to be "one factor that contributed to the decision," stated:

> [T]he court should have instructed the jury that for plaintiff to prevail he had to prove by a preponderance of the evidence that his age was the "determining factor" in his discharge in the sense that, "but for" his employer's motive to discriminate against him because of age, he would not have been discharged.

600 F.2d at 1019. The Third and Seventh Circuits have also adopted this standard. *Smithers* v. *Bailar, supra*; *Kephart* v. *Institute of Gas Technology, supra.*

On the other hand, the Second, Sixth and Ninth Circuits have approved jury instructions much like those rejected in *Loeb,* adopting a standard permitting recovery if age was "one such factor," or if it "made a difference" in determining whether an employee was to be retained or discharged. *Laugesen* v. *Anaconda Company,* 510 F.2d 307 at 317 (6th Cir. 1975); *Geller* v. *Markham,* 635 F.2d 1027 (2nd Cir. 1980); *Kelly* v. *American Standard Oil, Inc.,* 640 F.2d 974 (9th Cir. 1981). Furthermore, the Fourth Circuit itself previously approved jury instructions which only required that age be a "substantial or motivating factor" in a decision not to reappoint or promote. *Smith* v. *University of North Carolina,* 632 F.2d 316 (4th Cir. 1980).[10]

[10] This decision signalled an apparent departure from the Fourth Circuit's discussion in *Smith* v. *Flax,* 618 F.2d 1062 (4th Cir. 1980), in which the court required an age discrimination plaintiff to prove that age was a "determining factor" in a discharge. *Id.* at 1066.

In the instant case, the District Court judge refused to use Whirlpool's proposed jury instructions, which embodied the standards set forth in *Loeb* v. *Textron, Inc.* Instead, the jury instructions given in the instant case, and approved by a majority of the Fourth Circuit panel, were almost identical to those rejected by the First Circuit as improper in *Loeb* (Appendix E). Indeed, virtually the last words spoken by the trial court judge to the jury before it retired in the instant case were as follows (emphasis added):

> To put it another way, if you find age was not a reason for the action, you'd find for the defendant. If you find that age and business reasons both played a part, if you find that age played a producing part, you'd find for the plaintiff. If you find that it was a combination of age and other valid reasons, you'd find for the plaintiff; so *I suppose that the real issue still remains, has the plaintiff satisfied you that age played a part in the decision to demote him.*

Appendix E, p. E-9

Where strategic selection decisions are involved, the average jury's lack of familiarity with the business environment mandates that the clearest instructions be given so that any verdict is based on the appropriate factors and criteria. However, this final instruction to the *Spagnuolo* jury fell far short of that goal, being unduly vague at best and downright misleading at worst. As Senior Circuit Judge Field states in his dissent in this case:

> A reading of the charge in the present case indicates to me that the jury was permitted to return a verdict against Whirlpool merely upon its finding that the plaintiff's age was "a factor" in his demotion.

641 F.2d at 1116.

Had the District Court not disregarded the orderly process of proof set forth in *McDonnell Douglas*, Respondent would have been required to show that Whirlpool's reasons for demoting him were merely a pretext for discrimination. This error was further magnified when the court failed to require Spagnuolo to show that "but for" age considerations, he would not have been demoted. *Loeb* v. *Textron, Inc., supra.* As a result, the District Court not only required Whirlpool to prove the validity of its business reasons for demoting Spagnuolo and to prove that the business reasons were more compelling than any alleged discriminatory considerations, but also required it to affirmatively establish that age was not considered at all in the consolidation decision. Thus, the Fourth Circuit's approval of these jury instructions conflicts not only with the standards for "mixed motive" instructions set forth in *Loeb*, but also with this Court's holdings regarding the burden of proof required in discrimination actions. *Board of Trustees of Keene State College* v. *Sweeney*, 439 U.S. at 25-26, fn. 2; *Texas Department of Community Affairs* v. *Burdine*, 101 S.Ct. at 1095.

CONCLUSION

As the foregoing discussion reveals, the Fourth Circuit's decision in the instant case substantially departs—and in certain respects broadly misconstrues—the well established burden of proof formula set forth by this Court in individual non-ADEA employment discrimination actions.[11] The decision of the Fourth Circuit, which effectively requires an ADEA plaintiff to present no more than a *prima facie* case of discrimination in order to recover under the Act regardless of whatever business justification is proffered by the employer, *de facto* places the burden of proof on the ADEA defendant to prove both the legitimacy of the employment action and the absence of any consideration of age therein. This substantial departure from *McDonnell Douglas* and its progeny would, Petitioner submits, wholly justify a grant of certiorari in any event; when the instant case is evaluated in light of the substantial conflicts now existing in the circuits on these issues, the appropriateness of review by this Court is clear.

---

[11] To the best of Petitioner's knowledge, this Court has to date received no petition for certiorari directly addressing the issue of the threshold applicability of the *McDonnell Douglas* framework to ADEA actions tried to a jury. Several petitions have raised the issue on a procedural framework, *i.e.*, in the context of addressing the property of a grant of motions for summary judgment or for judgment notwithstanding the verdict. *See, e.g., Hardin* v. *Pitney Bowes*, 49LW 3769 (6 Cir. 1980); *cert. den.*, 49 USLW, 3861 (1981); *Morelock* v. *NCR Corp.*, 586 F.2d 1096 (6 Cir. 1978); *cert. den.*, 441 U.S. 906 (1978); *Kephart* v. *Institute of Gas Technology*, 581 F.2d 1287 (7 Cir. 1980); *cert. den.*, U.S. , 101 S.Ct. 1418 (1981).

Accordingly, Whirlpool respectfully urges that its petition be granted, and a writ of *certiorari* be issued to the Fourth Circuit Court of Appeals in the instant case.

Respectfully submitted,

CHARLES J. GRIFFIN, JR.
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

Attorney for Petitioner

Of Counsel:

BRADFORD L. LIVINGSTON
KATHRYN S. MUELLER
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

APPENDIX A

UNITED STATES COURT OF APPEALS

For The Fourth Circuit

No. 80-1035

Colombo A. Spagnuolo,

Appellee,

v.

Whirlpool Corporation,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

Argued October 8, 1980 Decided February 26, 1981

Before WINTER, Circuit Judge, FIELD, Senior Circuit Judge, and ERVIN, Circuit Judge.

Jeffrey K. Ross (Charles J. Griffin, Jr., Seyfarth, Shaw, Fairweather & Geraldson; Weinstein, Sturges, Odom, Bigger, Jonas & Campbell on brief) for Appellant; Samuel M. Millette, Ernest S. DeLaney, III (DeLaney, Millette, DeArmon and McKnight, P.A. on brief) for Appellee.

WINTER, Circuit Judge:

In a suit against his former employer, Whirlpool Corporation (Whirlpool), asserting a claim under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et. seq.*, Colombo A. Spagnuolo obtained a jury verdict establishing that he had willfully been discriminated against in employment because of his age and that he had suffered damages in the amount of $51,977. On the verdict and its additional findings, the district court gave judgment for the damages assessed by the jury, an additional amount of $51,977 as liquidated damages, attorneys fees of $60,000, costs, reinstatement, and pre- and post-judgment interest. Whirlpool appeals. We affirm except as to the item of pre-judgment interest.

I.

After almost twenty-four years of employment, plaintiff, when he was one month short of his fifty-third birthday, was demoted from his position as Manager of the Builder Department of the Charlotte Sales Division and assigned as Territory Manager of the Greensboro-Durham territory. When demoted, plaintiff sought but was denied the position of Territory Manager of the Charlotte territory. The demotion, which was to a position that plaintiff had formerly supervised, occurred on November 9, 1977, ostensibly because Whirlpool decided to combine the duties of Builder Sales Manager and that of Heating and Cooling Sales Manager. Plaintiff's duties were assumed by the Charlotte Heating and Cooling Sales Manager, a man forty-years old. Plaintiff immediately began working in the lesser position, but on January 4, 1978 he submitted a letter of resignation and accepted employment in an equivalent salesman position for one of Whirlpool's competitors.

We need not state further facts except with respect to some of the contentions to which they relate. It suffices to say that if submitted to the jury under legally correct instructions, the conflicting evidence amply permitted the jury to return its verdict finding liability on the part of Whirlpool under the Act and finding that plaintiff had sustained actual damages of $51,977. We turn therefore to the legal issues.

II.

Whirlpool's first argument for reversal is directed at the district court's instructions to the jury regarding what factual determination it was required to make to justify a verdict that Whirlpool had violated the Act. Specifically, Whirlpool contends that the jury should have been instructed that plaintiff's age must have been *the* determinative factor in Whirlpool's decision to demote him in order for the jury to find a violation of the Act.

Whirlpool's argument is foreclosed by our decision in Smith v. Flax, 618 F.2d 1062, 1066 (4 Cir. 1980). There, in prescribing the standard of causation that must be met to show a violation of the Act, we said that a plaintiff is required "to show that age was *a* determining factor in his discharge." (emphasis added) The phrase was derived from Loeb v. Textron, Inc., 600 F.2d 1003 (1 Cir. 1979), and other language in that opinion defines what is meant. There it was said that for an employee to recover under the Act it is not enough that he show merely that his age was a factor that affected the decision to discharge him. Rather, he must show that "but for" his employer's motive to discriminate against him because of his age, he would not have been discharged. *Id.* at 1019. It is in this sense that we, too, use the phrase "a determining factor." The only question then is whether the district court's instructions embodied

the standard as articulated in *Smith*. Taken as a whole, we think that they did.[1] There was on this point no error.

[1] Indeed, two portions of the district court's charge were specific on the issue. First, the jury was told:

> This is not a class action. We're not engaged in any deep inquiry into all the Whirlpool operations. It's simply a question inquiring into the question of whether this particular person was demoted and forced out of the job or forced out of his job through conduct which violated the Age Act.
>
> Now, you will remember that if the decision to treat Mr. Spagnuolo in a different fashion was based upon legitimate business reasons rather than upon age, the plaintiff is not entitled to recover, and the burden is upon the plaintiff to satisfy you that there was, that age was considered. The existence of a legitimate business reason or many legitimate business reasons, if you find there were such reasons, does not answer the question. If age played any significant part in the decision, then the plaintiff would be entitled to recover. Age has to be what we call a but for element in the decision. It's not the only element, not the only major element but, in order for the plaintiff to recover, age must be either the basis of the decision or one of the things which played a significant part in arriving at the decision. It has to be a producing cause. It has to be one of the factors which brought about the decision, one of the factors without which he would not have been demoted. It need not be the only cause, and he's not entitled to recover unless age was one of the elements which played a significant part in the decision to downgrade him in his work.

The jury was also given supplemental instructions after counsel registered objections to the initial instructions. Thus, immediately before retiring, the jury was told:

> A couple of partly repetitious instructions. The plaintiff says that age was a producing cause, one of the principal reasons for his discharge. The defendant denies that age played a part in the decision. The defendant also advances evidence of business reasons for the decision. Now, the de-

(Footnote continued on next page)

III.

Nor do we think that there was error in the district court's refusal to instruct the jury that it must find that the Act was not violated if it found that Whirlpool merely articulated or stated a legitimate nondiscriminatory reason or explanation for plaintiff's demotion, unless it also found that the reason or explanation was mere pretext. Whirlpool's argument is based upon its reading of Sweeney v. Board of Trustees of Keene State College, 439 U.S. 24 (1978). It reads *Sweeney* as holding that the mere articulation of a legitimate nondiscriminatory reason is sufficient for the employer to be entitled to judgment. We, however, read *Sweeney* to hold that the articulation of a legitimate nondiscriminatory reason is sufficient to insulate an employer from a directed verdict against it, *i.e.*, it dispels the adverse inference from a plaintiff's prima facie case. The jury in its consideration of all of the evidence may still find that the wrong occurred in the manner established by plaintiff.

Moreover, in this case, plaintiff did not rely on statistical data or any other kind of inferential proof of discrimina-

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[1] (Continued)

fendant has no burden to prove anything, so the burden of proving a business reason is not, you don't have to decide whether the defendant has proved that business reasons exist. The only question you have to decide is whether the plaintiff has satisfied you that age was the, was a principal or a producing cause for his demotion; and if you find there were valid business reasons and also that age played a part, the plaintiff would be entitled to a finding in his favor. The point I'm making is that the defendant has no burden to prove anything. The fact that the defendant may have satisfied you that there were valid business reasons doesn't end your inquiry. You've still got to make a finding as to whether the plaintiff has satisfied you that age played a producing part or was one of the but for causes of the decision.

tory motive. This is therefore not the type of case contemplated by McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), from which the requested instruction was obviously drawn. Plaintiff produced direct evidence of the purpose and conduct of Whirlpool, demonstrating discrimination against him and others because of age, that the jury clearly found persuasive. The reliance on direct evidence instead of inferences obviated any need for an independent showing that Whirlpool's asserted justifications were "pretextual." *See* Loeb v. Textron, Inc. 600 F.2d 1003, 1017-18 (1 Cir. 1979).[2]

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[2] *Loeb* discusses *McDonnell Douglas* with respect to three types of cases: (1) the "classic" or "pure" *McDonnell Douglas* case, (2) a case where plaintiff relies on direct evidence of discrimination, and (3) a case in which *McDonnell Douglas* elements are a significant part, but not all, of plaintiff's total evidence. This case does not fall into the first category; plaintiff did not rely on the classic *McDonnell Douglas* proof. Neither, as the dissent suggests, is it in the third category, "one in which proof of the *McDonnell Douglas* elements is a significant part of the plaintiff's total evidence, but where there is also other evidence, direct or circumstantial, that might support an inference of discrimination." *Loeb*, 600 F.2d at 1018-19. In this case, the plaintiff demonstrated not an inference but rather the fact of age discrimination; it is the second type of case described in *Loeb*. Accordingly, it "simply does not fit the mold of the *McDonnell Douglas* formula" because the plaintiff "relie[d] chiefly upon direct evidence of discriminatory motive." *Loeb*, 600 F.2d at 1018. We agree with the Court of Appeals for the First Circuit that the trial court "should not force a case into a *McDonnell Douglas* format if to do so will merely divert the jury from the real issues." We think the district court here instructed the jury as the *Loeb* opinion suggests, namely, that "the best charge may simply be one that emphasizes that plaintiff must prove, by a preponderance of the evidence, that he was discharged because of his age—with adequate explanation of the meaning of the age statute, the determinative role age must have played, etc." *Id. See also*, n.1, *supra*. Smith v. Flax, also cited by the dissent, does not mandate strict adherence to the *McDonnell Douglas* format, because it involved precisely the third type of case discussed in *Loeb*, mistakenly characterized by the dissent as the case before us.

Our decision in this regard also answers Whirlpool's argument that the district court improperly excluded evidence to support Whirlpool's business justification for plaintiff's demotion. As we read the record, Whirlpool amply proved its asserted reasons for consolidating two of its sales divisions and appointing someone other than plaintiff to head them. The excluded evidence merely derogates plaintiff's achievements with Whirlpool. At best the evidence is cumulative so that its exclusion constitutes no reversible error.

IV.

The jury found that Whirlpool's violation of the Act was "willful" and this finding was essential to the district court's assessment of liquidated damages in an amout equal to plaintiff's actual losses as found by the jury. In essence, the jury was told that Whirlpool's violation was willful if the jury found that "the demotion or transfer of the plaintiff was knowingly and intentially done by the Whirlpool Corporation with the knowledge that the Age Discrimination Act applied" and that the actions taken were not "accidental, or mistaken, or unknowing, or [taken] for some innocent reason . . . ." Whirlpool argues that it was entitled to an instruction that "Whirlpool must have known that its actions would violate the law" for its conduct to have beeen "willful."

The instruction given by the district court was in accord with the construction placed upon the meaning of "willful" applied in the enforcement of Fair Labor Standards Act as amended by the Portal-to-Portal Pay Act, 29 U.S.C. §§ 216, 260 (1976). The liquidated damages provision of the Age Discrimination in Employment Act derives the concept of willfulness from these analogous provisions of the FLSA. We think an instruction as to "willful" guided by experience under the Fair Labor Standards Act is the appropriate one

under the legislation which concerns us here. Brennan v. Heard, 491 F.2d 1, 3 (5 Cir. 1974), accurately describes what is required to show willfulness:

> Defendants contend that in order for a violation of the FLSA to be willful, the employer must have proceeded with knowledge that his actions were contrary to the requirements of the Act. This statutory interpretation cannot withstand the decisions of this Court in Coleman v. Jiffy June Farms, Inc., 5 Cir. 1972, 458 F.2d 1139, and Brennan v. J. M. Fields, Inc., 5 Cir. 1973, 488 F.2d 443. Those cases establish that neither a good faith belief in the lawfulness of his wage and overtime regulations nor complete ignorance of their invalidity shields the employer from the additional year of liability. Such nescience and naivete are not determinative on the question of willfulness under this Act. An employer acts willfully and subjects himself to the three year liability provision if he knows, or has reason to know, that his conduct is *governed by* the Fair Labor Standards Act.

Thus, we think that the district court's instruction here was proper. Certainly the evidence supported the jury's finding. In addition to the direct evidence that plaintiff's age was an operative factor in his demotion, Whirlpool admitted that it was aware of the Act when planitiff was demoted.

V.

Whirlpool contends that the district court should have instructed the jury that plaintiff could recover loss of salary only if it found that he had been "constructively discharged" by Whirlpool. Its theory is that when plaintiff resigned from his position at Whirlpool and went to work for one of its competitors, the termination of his employment was voluntary, and plantiff had no claim to lost wages unless he proved that Whirlpool deliberately made his

job as Greensboro Territory Manager so intolerable that he was forced to quit.

Although the district court declined to give the requested "constructive discharge" instruction, it did instruct the jury about plaintiff's duty to mitigate damages and in that connection told the jury that it must decide whether, as part of that duty, plaintiff should have stayed with Whirlpool, taken the job with Whirlpool's competitor, or sought another job elsewhere.

We think that on the facts of this case, there was no reversible error in the district court's instructions to the jury. Prior to his demotion, plaintiff was compensated at the rate of $2285 per month plus a yearly bonus which for 1977 was $8,000. In the position to which he was demoted, plaintiff was paid $900 per month plus commission, with expenses in the maximum amount of $350 per month for only six months of the year and without any bonus. Whirlpool's competitor from which plaintiff accepted employment compensated him at the rate of $1,200 per month, plus commission and an automobile with all expenses. Thus, consistent with his obligation to mitigate damages, plaintiff sought and obtained a better-paying job. Plaintiff did not resign from Whirlpool and accept employment paying him lesser compensation. There was therefore no factual basis on which to submit the concept of constructive discharge to the jury.

VI.

Plaintiff does not respond in his brief to Whirlpool's contention that having been awarded liquidated damages, plaintiff is not entitled to prejudgment interest. We think that plaintiff may not recover both.

Under the Fair Labor Standards Act, it has been held that the recovery of prejudgment interest is precluded by

the statutory authorization for liquidated damages. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 715 (1945); Masters v. Maryland Management Co., 493 F.2d 1329, 1334 (4 Cir. 1974). We agree that the same rule should apply when liquidated damages under the Age Discrimination in Employment Act are allowed. On remand, the district court will therefore reduce the judgment to remove any recovery for prejudgment interest.

VII.

Whirlpool vigorously attacks the equitable relief of reinstatement granted by the district court. It posits that plaintiff lacks the qualifications for the new position that was created by combining two managerships and that the animosities and tensions between the parties make reinstatement infeasible. We, however, do not disturb this aspect of the district court's judgment.

We recognize, of course, that reinstatement particularly at the level of an executive position may be entirely inappropriate where the evidence reflects hostility between the parties and the position involved demands a high degree of cooperation. *See* EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919 (S.D. N.Y. 1976), *aff'd* 559 F.2d 1203 (2 Cir.), *cert. denied*, 434 U.S. 920 (1977). But as we read the record, aside from the fact of this litigation, Whirlpool has neither demonstrated plaintiff's lack of qualifications nor has it made any showing that feelings are so high and tensions so exacerbated that the parties can no longer work together even with the high degree of cooperative effort that plaintiff's former and prospective position requires. With the substantial evidence of the esteem in which plaintiff was held prior to his demotion, we cannot presume that the litigation of this suit which, incidentally, tended to show that Whirlpool proceeded against plaintiff and others solely be-

cause of age and not as a result of any other personal characteristic, so destroyed the mutual confidence of the parties in one another as to obviate the possibility of any future harmonious and fruitful association. We therefore think it premature to abandon the remedy of reinstatement. The remedy is an equitable one, and an equitable decree is subject to revision upon application and for good cause shown when there is a material change in conditions. Rule 60(b)(5), F.R. Civ. P. Should the district court ever find it necessary to revise this portion of its judgment, it may then consider granting substitute equitable relief.

VI.

Finally, Whirlpool contends that the district court's allowance of counsel fees was excessive. We think that the district court properly applied the criteria in Walston v. School Board of Suffolk, 566 F.2d 1201, 1204-05 (4 Cir. 1977) in fixing fees, and we do not fault the quality of proof upon which it relied or the completeness of its findings.

On remand, plaintiff's counsel will be entitled to an additional allowance for their services on appeal since we affirm in major part the district court's judgment.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

FIELD, Senior Circuit Judge, dissenting:

This case, which I fear is one of the first of many, portends serious problems for employers in this circuit for, to me, the caveat is clear that any management reorganization which adversely affects an employee within the age bracket of forty to seventy years will expose the employer to a costly and disruptive law suit. In my opinion, legitimate and non-discriminatory personnel decisions can

be protected in such a case only by adherence to the orderly presentation of proof and even-handed instructions to the jury, bearing in mind that the ADEA proscribes only those personnel decisions in which age is the determinative factor.

I agree with the majority that the format of proof of *McDonnell Douglas* should not be applied inflexibly to a case tried to a jury such as the one before us, but I have serious reservations concerning the observation that "[t]he reliance on direct evidence instead of inferences obviated any need for an independent showing that Whirlpool's asserted justifications were 'pretextual' ". Ante, p. 5. While the production of direct evidence might relieve the plaintiff of the necessity of proving each of the elements of a *McDonnell Douglas* prima facie case, it does not justify a complete departure from the sensible and orderly presentation of evidence under that case. We recognized the desireability of such a pattern in *Smith* v. *Flax*, 618 F.2d 1062 (4th Cir. 1980), when we observed:

> [A] prima facie showing is rebutted if the employer shows a legitimate non-discriminatory reason for the employee's discharge. *Board of Trustees* v. *Sweeney*, 439 U.S. 24, 25 n. 2 (1978); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). After the employer has come forward with such evidence, the ultimate burden of persuasion remains upon the plaintiff to show that age was a determining factor in his discharge. *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1011-12 (1st. Cir. 1979); *Marshall* v. *Airpax Elec., Inc.*, 595 F.2d 1043, 1044 (5th Cir. 1979); *Marshall* v. *Westinghouse Elec. Corp.*, 576 F.2d 588, 592 (5th Cir. 1978) (Footnote omitted).

My examination of the record in the present case indicates that the district court's failure to follow the basic format of proof under *McDonnell Douglas* made it extremely diffi-

cult for the jury to intelligently appraise the evidence in the light of the issues before it.

In a case such as this I think we would be well advised to heed the admonitions of Judge Campbell in his thorough and perceptive opinion in *Loeb* v. *Textron*, 600 F.2d 1003, 1019 (1st Cir. 1979):

> At least until the Supreme Court further clarifies when proof along the lines of the prima facie case in *McDonnell Douglas* is required, we would suggest that, unless the parties themselves agree otherwise, the court depart only cautiously from the general *McDonnell Douglas* framework in this third type of case.
>
> Whatever the role of *McDonnell Douglas* in the particular case, we strongly encourage the court to go beyond the bare outlines of the issues mentioned here, and to provide the jury with a helpful and meaningful explanation of the relevance of the evidence introduced and of the interests of the parties. It would be useful to discuss the policies of the Age Discrimination Act and the plaintiff's rights thereunder, as the court did here to some extent. *The court should also, especially when a management level job is involved, explain that an employer is entitled to make its own subjective business judgments, however misguided they may appear to the jury, and to fire an employee for any reason that is not discriminatory.* (Emphasis added.)

Finally, I cannot agree with the majority that the district court's instructions properly embodied the standard of causation articulated in *Loeb* v. *Textron*, *supra*, and which was applied by us in *Smith* v. *Flax*, *supra*. In *Loeb*, the court stated:

> we do think, however, that the court should have instructed the jury that for plaintiff to prevail he had to prove by a preponderance of the evidence that his

> age was the *"determining factor" in his discharge in the sense that, "but for" his employer's motive to discriminate against him because of age, he would not have been discharged.* (Emphasis added.)

600 F.2d at 1019.

A reading of the charge in the present case indicates to me that the jury was permitted to return a verdict against Whirlpool merely upon its finding that the plaintiff's age was "a factor" in his demotion.

For these reasons, I would reverse the judgment and remand this case for a new trial.

APPENDIX B

CORRECTED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 80-1035

Colombo A. Spagnuolo,

Appellee,

versus

Whirlpool Corporation,

Appellant.

ORDER

The appellant's petition for rehearing and suggestion for rehearing in banc has been submitted to the court. A poll on the suggestion for rehearing in banc was requested and did not carry.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Winter with the concurrence of Judge Ervin. Judge Field dissents from the denial of the petition for rehearing.

Four the Court—By Direction.

/s/ William K. Slate, II
CLERK

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
Charlotte Division
C-C-78-107

COLOMBO A. SPAGNUOLO,
Plaintiff,
vs
WHIRLPOOL CORPORATION,
Defendant.
} JUDGMENT

This case was tried before a jury beginning on October 23, 1979, and a verdict was returned on October 26, 1979, as follows:

"1. Did the defendant, Whirlpool Corporation, in violation of the Age Discrimination in Employment Act, discriminate against the plaintiff, Colombo A. Spagnuolo, because of his age?

"ANSWER: Yes.

"2. If so, what amount, if any, is the plaintiff entitled to recover from the defendant, Whirlpool Corporation, for loss of earnings up to the present?

"ANSWER: $51,977.00.

"3. If so, was the violation of the Age Discrimination in Employment Act by the defendant, Whirlpool Corporation, willful.

"ANSWER: Yes."

Claims for equitable relief were tried to the court simultaneously and on December 6, 1979, the court entered an order allowing plaintiff's motion for equitable relief.

On the basis of the foregoing, IT IS ORDERED, ADJUDGED AND DECREED:

1. That plaintiff shall have and recover of the defendant the sum of $51,977.00 for loss of earnings up to the time of the verdict of the Jury.

2. That the plaintiff shall have and recover of the defendant an additional amount of $51,977.00 as liquidated damages.

3. That the defendant shall reinstate the plaintiff as Builder Sales Manager of the Charlotte Sales Division of the defendant or as the combined Builder/Heating and Cooling Sales Manager of the Charlotte Sales Division of the defendant, or in a position of equal stature, compensation, future prospects and responsibility.

4. That from the time of the verdict of the jury until the plaintiff is reinstated, the defendant shall pay the plaintiff the same salary, benefits and emoluments, including increases and bonuses, as have been or are being and will be paid to other managers of the Builder Department or other joint managers of the Builder/Heating and Cooling Department with no less seniority than the plaintiff—reduced, however, by what plaintiff is able to earn in other activity.

5. That the plaintiff shall recover an attorney's fee of $60,000.00, to be paid to the firm of DeLaney, Millette, DeArmon & McKnight, P. A.

6. That the plaintiff shall recover his costs of this action in the amount of $2,277.96 and also expenses incurred by the law firm of DeLaney, Millette, DeArmon & McKnight, P. A. in the sum of $1,522.14.

7. That the plaintiff recover prejudgment interest from the time of the verdict on the sum of $51,977.00 as found

to be due as the economic loss by the jury verdict. Such interest shall be at the maximum rate allowed by North Carolina law and shall be computed on a monthly basis on the difference between what the plaintiff earned and what the defendant was paying to the plaintiff's replacement at the Charlotte Sales Division of the defendant.

8. The plaintiff shall recover interest on this judgment at the maximum rate allowed under the North Carolina law on all items of damages, attorney's fees, costs and expenses from the date of the judgment.

This 11th day of December, 1979.

APPENDIX D

29 U.S.C. § 623

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

• • •

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

APPENDIX E

CHARGE TO THE JURY

COURT: Ladies and gentlemen, please remember the general instructions that were given at the beginning of the two-week term of court having to do with the general considerations in hearing evidence and making decisions. I will repeat some of those instructions. [Instructions on evidentiary considerations, credibility and the Statute followed]

Now, the plaintiff's contentions, briefly stated, are that he had been working for Whirlpool for a while, a good many years as manager of the Sales Builder Products in the Charlotte Division. He was in his early 50's and was in the protected class of employees, that he was doing his job well. You will remember all of the evidence pro and con on that subject, and that he was the subject of age discrimination, in that he was demoted from his job as a Builder Sales Manager for the Charlotte Division and was assigned to a sales territory that would pay him less, would be less rewarding financially, a territory which required him to travel or to incur a significant amount of time and expense without reimbursement for all of it, and that the defendant indicated that he could make more money and make more sales in the territory than was possible. You will recall whatever you do recall about the evidence to the effect that the Greensboro territory, which he was offered, had been reduced by taking out Charlotte and Greensboro, I believe, or one of those cities anyhow, which made it impossible for the plaintiff, if he took the job or when he took the job, to meet the sales quota based upon something over a million dollars in sales. He says that he stayed on so he wouldn't forfeit his bonus until the end of the year and then got another job and went to work without interruption in his employment but that

he had not gotten back to the level of compensation that he would have been making if he had stayed in the job he had. He contends that his resignation from the job was reasonable, that it was a part of a reasonable effort on his part to minimize his losses. He says that his refusal of any other job, well, I don't believe, as a matter of fact, the evidence showed he was offered but the one job after he was demoted; and he says that as a result of these actions that he has been damaged in the form of loss of earnings and that this is a continuing thing and that the reasons given by the defendants for demoting him and putting him on probation were, or whatever they did with regard to him—I don't remember whether he was put on probation or not, but he says that, as he saw it, that he had been put on the skids and that the demotion was just the first step to discharge, so he started looking around and didn't stay around to get fired but that he was, in effect, discharged without anybody taking credit for discharging him.

The defendants on that subject say there was no racial discrimination; that although he made good sales in his territory, this was in part a product of a market situation; that he had not kept the pace through the years; that it was not what you call a reduction in force but a reorganization of the management in the Builder Sales Products Division; and that they put the right man in the job who, on his record as we read it, was better for the job than Mr. Spagnuolo; and they gave the plaintiff an opportunity to make adequate earnings in the Greensboro territory. Their position is, first, there was no age discrimination, that it was a business decision, that Mr. Howard didn't know or think about the plaintiff's age, and that the choice of Mr. Brattain rather than Mr. Spagnuolo was a fully justified

decision; and that Mr. Brattain, regardless of age, was a better man for the job and choosing him was simply a proper, though not very pleasant, business decision, the sort of thing that has to be done by businessmen if they expect to keep their heads above water financially.

Now, those are the contentions very briefly stated, very incompletely stated, and if either party wishes to disclaim any of those contentions, they are free to do so. I'm not attempting to tell you what the case is but simply what some of the contentions are that you have to reckon with.

Your question then is whether the plaintiff was demoted because of age. One incidental piece of instruction is that the acts of the plaintiff's bosses, the various people in supervisory positions above him, are shown on this record where they have dealt with his employment situation to have been the actions of the Whirlpool Corporation and what they did, as far as your consideration of the case is concerned, was the actions of Whirlpool.

There are two kinds of evidence—I don't know that you need any particular instructions on this—at least two kinds of evidence, direct evidence—a man standing there who hears the gun sound and sees the coon fall out of the tree—and circumstantial evidence—the man who wasn't there but comes along and finds the situation after this had happened. I won't drag out any illustration of circumstantial evidence but it's simply indirect evidence, proof of circumstances from which there may reasonably be inferred some other facts. It's proof of one or several circumstances which point to the fact that something happened or did not happen. You may consider circumstances as they bear upon any of the facts which you have to determine or any of the

facts which you consider in arriving at your ultimate decision as to whether there was conduct by the defendant which amounted to discrimination, based on age.

You may consider a number of circumstances. I will outline briefly some of the contentions which arise on the evidence or some of the evidence which you can consider or have to consider in arriving at your decision. You will recall the testimony, whatever it was, about the failure of the defendant to post a placard indicating they were complying with the age law. You will remember whatever the evidence shows with regard to whether there was or was not discrimination against other persons between 40 and 65 years of age in terms or conditions of employment or in employment or discharge or demotion of those other persons. You may consider whether there is or is not on this evidence a showing of a pattern or a practice of age discrimination. If there is a pattern and practice, you will consider what area, if any, it covers. It's not necessary in this case that there be proof of a pattern or of a practice of Whirlpool generally throughout its operations. The evidence, in fact, did not appear to show a nationwide pattern of discrimination. It would be for you to determine whether, in the local area covered by the plaintiff's evidence, was there such a pattern and practice based on all the evidence you have considered. There was some argument about conspiracy. This is one part of the argument that was made, but I haven't heard any serious debate about conspiracy because conspiracy is just another word for people deciding to do something and getting together to do it. I prefer not to give you any specific instructions about conspiracy. It's just up to you to consider all of the things which were done or not done that you may find from the evidence which prove that they did or prove that they did not have a local practice or a regional practice of age discrimination, whether

there was or was not a decision to demote Mr. Spagnuolo because of his age, and whether there was or was not a specific intent to do this thing, that is, to releave him of his managerial job and put him in a sales territory. You will consider the stated company policies to the extent that you find that they indicate there was or was not such actions discriminatory against him. This is not a class action. We're not engaged in any deep inquiry into all the Whirlpool operations. It's simply a question inquiring into the question of whether this particular person was demoted and forced out of the job or forced out of his job through conduct which violated the Age Act.

Now, you will remember that if the decision to treat Mr. Spagnuolo in a different fashion was based upon legitimate business reasons rather than upon age, the plaintiff is not entitled to recover, and the burden is upon the plaintiff to satisfy you that there was, that age was considered. The existence of a legitimate business reason or many legitimate business reasons, if you find there were such reasons, does not answer the question. If age played any significant part in the decision, then the plaintiff would be entitled to recover. Age has to be what we call a but for element in the decision. It's not the only element, not the only major element but, in order for the plaintiff to recover, age must be either the basis of the decision or one of the things which played a significant part in arriving at the decision. It has to be a producing cause. It has to be one of the factors which brought about the decision, one of the factors without which he would not have been demoted. It need not be the only cause, and he's not entitled to recover unless age was one of the elements which played a significant part in the decision to downgrade him in his work. [Instructions on damages and willfulness followed]

I'm required to ask the lawyers to give a critique on my instructions. If you will excuse us for a few minutes, we will do that.

WHEREUPON, the following proceedings take place in the conference room out of the hearing of the members of the jury.

COURT: Does the plaintiff have any requests for additional instructions?

MR. MILLETTE: Only one thing. It really doesn't have to do with charges on the law. I thought it might be helpful to the jury to explain to them that the verdict must be a unanimous verdict. They might have gotten the idea at the beginning that they could take the verdict of less than 12.

COURT: I guess I didn't say that. I'll do that.

MR. MILLETTE: I don't know whether you generally instruct them on picking a foreman.

COURT: Okay, anything further?

MR. MILLETTE: No, sir.

COURT: Anything from the defendant?

MR. GRIFFIN: I think there should be a separate instruction on constructive discharge. We proposed one to you.

COURT: I think I have ruled on that. Didn't I make a note on your requested instructions that they were denied?

MR. GRIFFIN: I'm restating objection on the instruction. The other question I have is whether or not your statement that if the company has shown a sound business purpose behind its decision, it would not be age discrimination. I think I would rather see an instruction in terms

of if the company had any reason or no reason whatever for doing what it did, so long as it was not motivated by age, they must find for the defendant.

MR. MILLETTE: They have assigned reasons, though.

COURT: I don't think I put in balancing between business reason on the one hand and age discrimination on the other, did I?

MR. GRIFFIN: You did say, once, something to the effect that if you find a business reason . . .

COURT: I will tell them again that the defendants have no burden to show business reason or other reason, but if they show a business reason was the only, was the sole, were the sole cause of the discharge, they would win.

MR. GRIFFIN: My point is that if the jury does not believe this was a sound business decision and if they don't believe age was a part, they must find for the defendant.

COURT: I'm agreeing with your statement of the law. I don't know that. Were you listening, Emily? Did I get my tongue twisted up on that, Emily? It might not hurt to say any reason or no reason.

LAW CLERK: But also I would suggest repeat the fact that establishment of sound business reason doesn't eliminate age discrimination.

MR. GRIFFIN: The second part of my objection on this would be a proposal on page 6 of the instructions. He's, Spagnuolo has established but for his age, he would not have been demoted. Whirlpool must merely articulate or state a legitimate nondiscriminatory reason or explanation for the demotion of Spagnuolo or explanation for the demotion of Spagnuolo and its refusal to give him the Charlotte terri-

tory. This is, of course, the Supreme Court's decision in the college case in New Hampshire. I believe the same law would apply under the Age Act.

COURT: I think it's more than articulate a reason. The jury has to determine that age played no part in the decision.

MR. GRIFFIN: We have no burden to prove any reason for doing it so long as we articulate a reason.

COURT: But their saying the words doesn't require the jury to believe the words.

MR. DELANEY: They are tied up in the prima facie case illustration.

COURT: That raises the defense but it doesn't instruct the jury. No, I think that is an erroneous request legally.

MR. GRIFFIN: It may well be. I'd like to make it anyway.

COURT: That's the same one you have in your request. I'll try to cover this.

MR. DELANEY: If you do give the request about the business reason, if you will include age as a determining factor as in that last sentence of our requested instructions, the Sixth Circuit case.

MR. GRIFFIN: One other objection for the record, what is a willful violation and, as we propose, Whirlpool must have known that its acts would violate the law.

COURT: Ignorance of the law as an excuse, I don't think I'll make that. That's raised in every civil rights case you ever try—if he didn't know he was violating the law, he couldn't be held liable. I don't believe that is correct law.

MR. GRIFFIN: Just for the record. Thank you.

WHEREUPON, the following proceedings take place in the courtroom in the hearing of the members of the jury.

COURT: A couple of partly repetitious instructions. The plaintiff says that age was a producing cause, one of the principal reasons for his discharge. The defendant denies that age played a part in the decision. The defendant also advances evidence of business reasons for the decision. Now, the defendant has no burden to prove anything, so the burden of proving a business reason is not, you don't have to decide whether the defendant has proved that business reasons exist. The only question you have to decide is whether the plaintiff has satisfied you that age was the, was a principal or a producing cause for his demotion; and if you find there were valid business reasons and also that age played a part, the plaintiff would be entitled to a finding in his favor. The point I'm making is that the defendant has no burden to prove anything. The fact that the defendant may have satisfied you that there were valid business reasons doesn't end your inquiry. You've still got to make a finding as to whether the plaintiff has satisfied you that age played a producing part or was one of the but for causes of the decision.

To put it another way, if you find age was not a reason for the action, you'd find for the defendant. If you find that age and business reasons both played a part, if you find that age played a producing part, you'd find for the plaintiff. If you find that it was a combination of age and other valid reasons, you'd find for the plaintiff; so I suppose that the real issue still remains, has the plaintiff satisfied you that age played a part in the decision to demote him.

There are a couple of other things. You have to all agree. You should select a foreman, and all of you have to agree before you can answer any issue. You may retire now and make up your verdict.

WHEREUPON, the jury retires at 5:05 PM.

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ALEXANDER L. STEVAS
CLERK

No. 81-70

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WHIRLPOOL CORPORATION,

Petitioner,

VS.

COLOMBO A. SPAGNUOLO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION BY WHIRLPOOL CORPORATION FOR A WRIT OF CERITIORARI

SAMUEL M. MILLETTE
DELANEY, MILLETTE, DEARMON
& MCKNIGHT, P.A.
Suite 100 Civic Plaza
801 E. Trade St.
Charlotte, N.C. 28202
(704) 372-9990
Attorney for Respondent

Of Counsel:
ERNEST S. DELANEY III
DELANEY, MILLETTE, DEARMON
& MCKNIGHT, P.A.
Suite 100 Civic Plaza
801 E. Trade St.
Charlotte, N.C. 28202
(704) 372-9990

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STATEMENT OF THE CASE

Colombo A. Spagnuolo, the respondent, was demoted from his job as manager of the Builder Department of the Charlotte Sales Division of Whirlpool Corporation one month short of his fifty-third birthday and two months short of the twenty-fourth anniversary of his employment with the petitioner. When demoted, Spagnuolo requested that he be given the Charlotte territory in his demoted status as a territory manager. Instead, Whirlpool, in violation of its written employment policy, gave respondent a distant territory, assigned him a yearly sales quota which was more than double the amount of sales that the territory had ever produced, and misrepresented to him the amount of sales previously made in the territory.

Spagnuolo was replaced in his position as builder sales manager by Daniel Brattain, a man who had just turned forty. Whirlpool asserts in its Statement of the Case that "Brattain's performance record as Heating and Cooling Manager was far superior to that of the respondent." (Petition @ 3) However, the evidence offered in this case was directly to the contrary. Spagnuolo was twice awarded the Jack Sparks Whirlpool Achievement Award for being the outstanding sales manager in the entire country for Whirlpool Corporation. In the seven years that he was builder sales manager, his department in Charlotte accounted for sixty-nine percent of the profits made in the United States by Whirlpool for the sale of all Whirlpool products, not just builder products. Respondent's sales and profit quotas, established by Whirlpool, were exceeded by him in every year of his tenure except for 1974, which was a recession year when building starts took a drastic downturn. During the same seven year period, Daniel Brattain made his sales quota on only three occasions, and then by small margins. Brattain's performance was so marginal that the Whirlpool Corporation found it necessary in 1976 to take fifty percent of his territory and award it to an independent distributor because he was not "doing a good job".

At the trial of this case, respondent introduced abundant direct evidence showing that Whirlpool proceeded against him solely on the basis of his age. Testimony was offered that Mr. McCall, the general sales manager of the Charlotte Sales Division and plaintiff's immediate supervisor, stated less than a year before plaintiff's termination, that he had "too many fifty year old managers or people nearing fifty years of age, that we have to think of getting rid of." Evidence was offered that Mr. Johnston, the regional manager of petitioner for the Southeast Region, stated on two occasions that he had a plan to replace the older builder sales managers with younger sales managers, including specifically by name, respondent and two other builder sales managers. Mr. Michael Wheeler testified that Mr. Johnston told him that he "was one in a series of changes that he hoped to initiate in order to replace older builder sales managers and called Spagnuolo by name" as well as Vern Perry and Raymond Klausing. Within six months of enunciating this plan, three of the four builder sales managers in the Southeast Region were replaced by younger men. In May of 1977, Michael Wheeler, age 33, replaced Ray Klausing, age 55; on June 1, 1977 Dennis Fitch, in his middle 30's, replaced Vern Perry, age 54; and on November 9, 1977, Daniel Brattain, age 40, replaced the respondent, C.A. Spagnuolo, age 53. Evidence was offered that James Workinger, a national manager for Whirlpool, heard the statements of Mr. Johnston concerning the impending termination of respondent on account of age, and told respondent and another Whirlpool employee about these statements. A letter of Mr. Workinger to respondent was introduced stating that the demotion of respondent was "one of the injustices in life" and that respondent had been "screwed" by Whirlpool. A memo from Mr. McCall to Mr. Johnston, written immediately prior to respondent's demotion, was introduced, asking "should I now unload on Spagg?"

The former merchandising manager of the Charlotte sales branch of Whirlpool testified of a statement made by

Mr. McCall, the general sales manager "that he had to get rid of Charlie Gardner and Ed Hooks (two territory managers) because of their age." Thereafter, Mr. Hooks and Mr. Gardner were both terminated. Spagnuolo, himself, hired a territory manager to work in the builder department in 1976 who was fifty-one years of age. At that time respondent was told by Mr. McCall, the general manager, and Mr. Johnston, the regional manager, "not to hire anybody this old again" and "not to hire any more old people". The personnel file of Whirlpool on respondent was put into evidence, which stated "Do not publish" the reason for Spagnuolo's demotion. The evidence also demonstrated the blatant refusal of Whirlpool to post the poster required by the Age Discrimination in Employment Act advising employees of their rights under the Act even though it was aware of the existence of the Act and the regulations of the Department of Labor promulgated thereunder.

The evidence graphically illustrated Whirlpool's plan to begin ridding itself of older managers. The jury listened to direct statements made by high level Whirlpool officials of the southeastern region concerning replacing older builder sales managers with younger persons, and then, witnessed the culmination of this plan by the replacement of three of the four builder sales managers, including the plaintiff, by younger men. The jury viewed documentary evidence taken from defendant's own files demonstrating clearly that defendant's actions were motivated by arbitrary age discrimination. In fact, the Fourth Circuit noted in its opinion that the evidence in this case "tended to show that Whirlpool proceeded against plaintiff and others solely because of age and not as a result of any other personal characteristic." *Spagnuolo v. Whirlpool Corporation*, 641 F.2d 1109, 1115 (4th Cir. 1981).

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. The Fourth Circuit Opinion Is Not In Conflict With Prior Decisions Of This Court With Respect To The Order Of Proof Under The Age Discrimination In Employment Act.

Petitioner asks this Court to grant a writ of certiorari because "the Fourth Circuit's decision regarding the order of proof is in conflict with the prior decisions of this Court and other courts of appeals." (Petition at 4). Petitioner incorrectly states that it "appealed the judgment of the District Court, alleging that the jury had been improperly instructed upon the allocation and order of proof in a case under the ADEA." (Petition at 4). In fact, Whirlpool did not assert in the trial court that *McDonnell Douglas* mandated a required order of proof, and it did not submit requests for instructions to the trial court patterned after the *McDonnell Douglas* prima facie case illustration. Petitioner also did not present to the Fourth Circuit as an issue for review, the proposition that the *McDonnell Douglas* format of proof was mandatory in an ADEA case. As a consequence, this issue was never argued or briefed in either the district court or the court of appeals, and is not an appropriate subject for the granting of a writ of certiorari. *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Adickes v. S.H. Kress & Company*, 398 U.S. 144, 147 n. 2 (1970).

Whirlpool now contends for the first time that this Court's decision in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) mandates a tripartite presentation of evidence in an age discrimination case — initially, a plaintiff must present evidence limited to satisfying the four elements of the prima facie case illustration; next, the employer must present evidence of his legitimate business reasons for the decision; and thereafter, the plaintiff must present direct evidence of discrimination, evidence of pretext or evidence that the business decision was applied in a discriminatory fashion. According to petitioner, if the

trial court does not adhere to this rigid order of proof, a judgment cannot stand. In actuality, the order of proof in the trial court comported with the *McDonnell Douglas* format. The plaintiff's case in chief established a prima facie case under *McDonnell Douglas* and also presented direct evidence of age discrimination as well as evidence of pretext. Whirlpool thereafter introduced evidence intended to show its reasons for the demotion. On rebuttal, the plaintiff offered additional direct evidence of discrimination as well as evidence of pretext. It is true that evidence of pretext was introduced by the plaintiff not only on rebuttal, but also during its case in chief and by cross-examination of the defendant's witnesses. However, we do not read *McDonnell Douglas* as prohibiting such a practice. In fact, this Court in its recent decision in *Texas Department of Community Affairs v. Burdine*, ___ U.S. ___, 101 S. Ct. 1089 (1981) sanctioned such a logical order of proof:

> In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case . . . This evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendent, will suffice to discredit the defendant's explanation. 101 S. Ct. at 1095 n. 10.

Petitioner did consistently and erroneously maintain at both the trial and appellate level that it was entitled to a judgment if it "merely articulated a legitimate nondiscriminatory reason" for its job actions toward respondent. Whirlpool, in its requested instructions submitted to the trial court, lifted this phrase completely out of context from the prima facie case illustration of *McDonnell Douglas*, and requested the trial court to utilize the

phrase, with no other explanation to the jury of the relevant aspects of a prima facie case. Petitioner's proffered instructions erroneously asked the court to charge that even if Spagnuolo proved that but for his age he would not have been demoted and assigned the distant territory, the jury must find "no liability" if "Whirlpool merely articulate(s) or state(s) a legitimate, non-discriminatory reason" for its actions. The proposed instructions did not inform the jury that it could find the alleged business reason to be pretextual; rather, under petitioner's instructions, the articulation of a reason, by itself, mandated a verdict for Whirlpool. Under such instructions Whirlpool would automatically prevail if it offered *any* evidence of a legitimate business reason for its actions. The trial court correctly rejected this erroneous request:

> COURT: I think it's more than articulate a reason . . . their saying the words doesn't require the jury to believe the words. That raises the defense but it doesn't instruct the jury. No, I think that is an erroneous request legally.

Petitioner's view of *McDonnell Douglas* and its progeny was also rejected by the Fourth Circuit:

> [Whirlpool] reads *Sweeney* as holding that the mere articulation of a legitimate nondiscriminatory reason is sufficient for the employer to be entitled to judgment. We, however, read *Sweeney* to hold that the articulation of a legitimate nondiscriminatory reason is sufficient to insulate an employer from a directed verdict against it, *i.e.*, it dispels the adverse inference from a plaintiff's prima facie case. The jury in its consideration of all of the evidence may still find that the wrong occurred in the manner established by plaintiff. 641 F.2d at 1112

The interpretation of the law expressed by the Fourth Circuit in the present action was endorsed by this court in

Texas Department of Community Affairs v. Burdine, ____ U.S. ____, 101 S. Ct. 1089 (1981). In *Burdine* this court made it clear that the articulation of a business reason does not entitle the employer to judgment, but merely "destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence." 101 S. Ct. at 1095 n. 10

> Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case. 101 S. Ct. at 1094

The trial judge was also correct in deciding not to employ the *McDonnell Douglas* formula in his charge to the jury.[1] In *McDonnell Douglas*, this Court recognized that in most Title VII cases a plaintiff does not have available direct evidence of discrimination, and also, that the employer has the best access to the reasons that precipitated the job action complained about. Consequently, the Court held that a plaintiff in a Title VII case may establish a prima facie case by proving that he "belongs to a racial minority", that he "applied and was qualified for a job for which the employer was seeking applicants", that "despite his qualifications, he was rejected", and that "after his rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications," 411 U.S. at 802. Such a showing raises an inference of discrimination and causes the burden to shift to the employer "to articulate some legiti-

1. Neither petitioner nor respondent requested the trial court to utilize the *McDonnell Douglas* guidelines in his instructions to the jury, although Whirlpool did request the court to charge that the jury must return a verdict of "no liability" if Whirlpool merely articulated a legitimate business reason for its action.

mate, non-discriminatory reason for the employee's rejection." 411 U.S. at 802. By adducing such evidence, the employer meets plaintiff's prima facie case. The plaintiff, however, must then "be afforded a fair opportunity" to show that the employer's stated reason, "was in fact pretext." 411 U.S. at 804. The *McDonnell Douglas* formulation allows a Title VII plaintiff to have his day in court, even though he does not have available direct evidence of discrimination, by requiring the employer to come forward and explain the reason for its job actions.

This Court has cautioned, though, that the *McDonnell Douglas* guidelines were "never intended to be rigid, mechanized or ritualistic", *Furnco Construction Corporation v. Waters*, 438 U.S. 567, 578 (1978), nor to be the exclusive method for proving a Title VII claim of discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977). The Courts of Appeals considering the question have determined that the *McDonnell Douglas* format may be appropriate in a jury trial of an age discrimination case, but should not be applied inflexibly to all such cases. *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 919-920 (2nd Cir. 1981); *Smith v. University of North Carolina*, 632 F.2d 316, 332-33 (4th Cir. 1980); *Loeb v. Textron, Inc.* 600 F.2d 1003, 1014-1019 (1st. Cir. 1979); *Laugesen v. Anaconda Company*, 510 F.2 307 (6th Cir. 1975)

For instance in *Laugesen*, the Sixth Circuit stated:

> While it may not be unreasonable to assume that in a proper case the guidelines established in *McDonnell Douglas v. Green* can be applied in age discrimination jury cases, we believe it would be inappropriate simply to borrow and apply them automatically. 510 F.2d at 312.

Similarly, the First Circuit in *Loeb* cautioned:

> While we conclude that *McDonnell Douglas* provides

> an appropriate and workable formula for the trial of age discrimination cases, it should not be used inflexibly as a vehicle for organizing evidence or presenting a case to a jury. Above all, it should not be viewed as providing a format into which all cases of age discrimination must fit . . . *McDonnell Douglas* points to one, but surely not the only, way of establishing a legally sufficient prima facie case and of organizing and analyzing the evidence in a private discrimination case. 600 F.2d at 1017.

Both the First Circuit in *Loeb* and the Fourth Circuit in *Smith* noted that most age discrimination cases will not fit "a 'classic' or 'pure' *McDonnell Douglas* paradigm."

> At least two other types of cases seem likely, one is a case which simply does not fit the mold of the *McDonnell Douglas* formula, as where plaintiff's evidence of discrimination is significantly different. (For example, where plaintiff relies chiefly upon direct evidence of discriminatory motive in a letter or on an admission from defendant). The court should not force a case into a *McDonnell Douglas* format if to do so will merely divert the jury from the real issue; rather, it should use its best judgment as to the proper organization of the evidence and the charge. In cases of this type, the best charge may simply be one that emphasizes that plaintiff must prove, by a preponderance of the evidence, that he was discharged because of his age — with adequate explanation of the meaning of the age statute, the determinative role age must have played, etc. *Loeb*, 600 F.2d at 1018, *Smith*, quoting *Loeb*, 632 F.2d at 335.

In the present action, respondent offered substantial direct evidence of age discrimination by Whirlpool. Perhaps the most significant direct evidence was the statement by the regional sales manager made on two separate occasions, and reported by two different persons, that he had a plan to replace the older

builder sales managers with younger men, and mentioning specifically Spagnuolo by name. The jury also heard the statement of plaintiff's immediate supervisor that he had too many fifty year old managers that he had to get rid of. The other substantial direct evidence of discrimination is set forth in respondent's Statement of the Case (brief of respondent at 2-3). Indeed, the Fourth Circuit noted in its opinion:

> *In this case, the plaintiff demonstrated not an inference but rather the fact of age discrimination* . . . Accordingly, it simply does not fit the mold of the *McDonnell Douglas* formula because the plaintiff relied chiefly upon direct evidence of discriminatory motive. 641 F.2d at 113 n. 2. (emphasis added)

Given the overwhelming direct evidence of age discrimination, it would have been superfluous and confusing for the trial judge to instruct the jury using the *McDonnell Douglas* guidelines, particularly in light of the fact that neither petitioner nor respondent requested the trial court to employ the *McDonnell Douglas* formula in his instructions. Accordingly, the court was correct in not casting its charge in a *McDonnell Douglas* format but rather simply emphasizing that plaintiff had to prove by a preponderance of the evidence that he was discriminated against due to his age. *See Loeb v. Textron*, 600 F.2d at 1018; *Smith v. University of North Carolina*, 632 F.2d at 335.

Petitioner argues that the failure of the trial court to utilize the *McDonnell Douglas* format, in its instructions effectively "required Whirlpool to prove that its demotion of the respondent was justified." (Petition at 9). However, the trial judge on five separate occasions instructed the jury that the burden of proof on every issue was upon the plaintiff.[2] In addition, the trial judge specifically told the jury two other times that the defendant had no burden to prove the legitimacy of its proffered business reasons:

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2. Petitioner failed to reproduce that portion of the trial judge's instruction in the appendix accompanying its petition.

> The plaintiff says that age was a producing cause, one of the principal reasons for his discharge. The defendant denies that age played a part in the decision. The defendant also advances evidence of business reasons for the decision. *Now, the defendant has no burden to prove anything, so the burden of proving a business reason is not, you don't have to decide whether the defendant has proved that business reasons exist.* The only question you have to decide is whether the plaintiff has satisfied you that age was the, was a principal or producing cause for his demotion . . . *The point I'm making is that the defendant has no burden to prove anything.* The fact that the defendant may have satisfied you that there were valid business reasons doesn't end your inquiry. You've still got to make a finding as to whether the palintiff has satisfied you that age played a producing part or was one of the but for causes of the decision. (emphasis added)

Clearly, the jury was not misled on this point.

II. THE FOURTH CIRCUIT CORRECTLY DECIDED THE STANDARD OF CAUSATION NECESSARY TO SHOW A VIOLATION OF THE ADEA BY REQUIRING A PLAINTIFF TO SHOW THAT AGE WAS "A DETERMINING FACTOR" IN THE EMPLOYMENT DECISION

Petitioner presented to the Fourth Circuit Court of Appeals for review the issue of "whether the trial court erred in refusing to instruct the jury that the ADEA was violated only if age was *the* determinative factor in the demotion decision." It contended both at trial and before the Court of Appeals that a plaintiff's ultimate burden of persuasion was to show that age was *the* determinative factor in the employment decision. In fact, petitioner's jury instructions submitted to the trial court erroneously required respondent to prove that age must be *the* determinative factor not only in the decision to demote him, but also in the subsequent decision to refuse to assign him the Charlotte sales territory.[3] The proffered instructions read as follows:

> Before you may find for Spagunolo, you must be convinced by a preponderance of the evidence that Whirlpool demoted Spagnuolo *and* refused to allow him to have the Charlotte territory because of his age. In other words, Spagnuolo must prove by a preponderance of the evidence that his age was *the determinative or key factor* in Whirlpool's decision to demote him *and* refuse his request regarding the Charlotte territory. Suspicions that age was *the determinative or key factor* in Whirlpool's decisions regarding Spagnuolo cannot be the basis for finding for Spagnuolo. (emphasis added)

The Fourth Circuit correctly rejected petitioner's contention concerning this standard of causation:

> Whirlpool contends that the jury should have been instructed that plaintiff's age must have been *the* determinative factor in Whirlpool's decision to demote him in order for the jury to find a violation of the Act.
>
> Whirlpool's argument is foreclosed by our decision in *Smith v. Flax*, 618 F.2d 1062, 1066 (4th Cir. 1980). There, in prescribing the standard of causation that must be met to show a violation of the Act, we said that a plaintiff is required "to show that age was *a* determining factor in his discharge." The phrase was derived from *Loeb v. Textron, Inc.*, 600 F.2d 1003, (1st Cir. 1979), and other language in that opinion defines what is meant. There it was said that for an employee to recover under the Act it is not enough that he show merely that his age was a factor that affected the decision to discharge him. Rather, he must show that "but for" his employer's motive to discriminate against him because of his age, he would not have been discharged. It is in this sense that we, too, use

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3. However, it is clear that if *either* decision was predicated upon age, plaintiff would be entitled to recover. *See Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir. 1977); *Bertrand v. Orkin Exterminating Co.*, 454 F.Supp. 78, 81 (N.D. Ill. 1978).

> the phrase "a determining factor." 641 F.2d at 1112. (emphasis by the court)

Petitioner states that the Fourth Circuit has now departed from its position enunciated in *Smith v. Flax* of "requiring an age discrimination plaintiff to prove that age was a determining factor in a discharge", and cites *Smith v. University of North Carolina*, 632 F.2d 316 (4th Cir. 1980) in support of this proposition. (Petition at 12). We read the decision in *Smith v. University of North Carolina* as being completely in accord with both *Smith v. Flax* and *Spagnuolo*. There, the Fourth Circuit stated with respect to the standard of causation required to show a violation of the ADEA:

> Age need not be the sole reason but it must have been a substantial or motivating reason — a determinative reason — in the University's determination. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979). That determination . . . is the central concern in all age discrimination cases. 632 F.2d at 333.

In further elucidating the standard of causation required under the ADEA, the *Smith* court stated, "It is clear, of course, that the law requires only that age be *a* causative or determinative factor in the decision, not the sole reason." 632 F.2d at 337 (emphasis by the court).[4]

Petitioner incorrectly asserts that three circuits have held that an ADEA plaintiff must show that age was *the* determinative factor in the employment decision in order to show a violation of the Act, citing *Loeb v. Textron, Inc., supra, Smithers v. Bailar*, 629 F.2d 892 (3rd Cir. 1980); and *Kephart v. Institute of Gas Technology*, 630

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4. The Fourth Circuit reiterated its position concerning the standard of causation in *Equal Employment Opportunity Commission v. Baltimore and Ohio Railroad*, 632 F.2d 1107, 1110 (4th Cir. 1980) where it stated, "It is, of course, necessary that age be a determinative factor, but not the sole determining factor."

F.2d 1217 (7th Cir. 1980); *cert. den.*, ___ U.S. ___, 101 S. Ct. 1418 (1981). An analysis of these cases reveals that the Seventh Circuit has not ruled definitively on the standard of causation required under the ADEA, and the holdings of the First Circuit and Third Circuit are in complete accord with the decision in the case at bar. The Seventh Circuit in *Kephart* did not even discuss the appropriate standard of causation under the ADEA. In *Smithers*, the Third Circuit held that it would be reversible error for a trial court to require a plaintiff to prove that age was *the* determinative factor in the employment decision. That case involved a review of the standard of causation applied by a trial judge in a non-jury ADEA case. The *Smithers* court affirmed the judgment of the trial court, finding that: "Although, isolated statements in the District Court opinion say that appellant failed to prove age was 'the determinative factor' in the Board's decision, the opinion taken as a whole concluded that plaintiff failed to prove age was 'a determinative factor'". 629 F.2d at 897-98. The First Circuit in *Loeb* enunciated the required standard of causation in virtually the same language used by the Fourth Circuit in the case at bar:

> We conclude that, at least where defendant denies that age was a consideration, the plaintiff must prove that he would not have been discharged "but for" his age — *i.e.*, that age must have been a determinative factor." 600 F.2d at 1010-11.

The Fourth Circuit's decision in the present case is in accord with every decision of each court of appeals that has determined the standard of causation necessary to show a violation of the ADEA. Each of these circuits has held that a plaintiff's ultimate burden of persuasion to establish a violation of the ADEA is to show that age was "a determining factor" in the employment decision. *See Geller v. Markham*, 635 F.2d 1027, 1035 (2nd Cir. 1981); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 984-85 (9th Cir. 1981); *Smithers v. Bailar*, 629 F.2d 892, 896-98

(3rd Cir. 1980); *Loeb v. Textron, Inc.*, 606 F.2d 1003, 1011 (1st Cir. 1979); *Cleverly v. Western Electric Company*, 594 F.2d 638, 641 (8th Cir. 1979); *Marshall v. Air Pax Electronics, Inc.*, 595 F.2d 1043, 1044 (5th Cir. 1979); *Laugesen v. Anaconda Company*, 510 F.2d 307, 317 (6th Cir. 1975). Thus, the Fourth Circuit's decision with respect to the standard of causation necessary to show a violation of the ADEA is clearly correct and provides no basis for granting a writ of certiorari.

CONCLUSION

The order of presentation of evidence in the trial court was not in conflict with the decisions of this Court in *McDonnell Douglas v. Green* and its progeny. The Fourth Circuit decision did not address this contention of petitioner because the issue was not raised in either the district court or the court of appeals. Accordingly, it is not an appropriate subject for the granting of a writ of certiorari.

Petitioner's argument that the articulation of a legitimate nondiscriminatory reason by an employer for its job action entitles it to a judgment in a ADEA case is predicated upon a misapprehension of this Court's prior decisions. The holding of the Fourth Circuit that the articulation of a legitimate reason "dispels the adverse inference of a plaintiff's prima facie case (641 F.2d at 1112) is clearly correct and in accord with the rulings of this Court.

The Fourth Circuit applied the proper standard of causation by requiring an ADEA plaintiff to show that his age was "a determining factor" in the sense that "but for his employer's motive to discriminate against him because of his age, he would not have been discharged." 641 F.2d at

1112. Petitioner's contention that age must be the sole, or the determinative, factor in the employment decision is not supported by the decision of any court of appeals.

For these reasons, we respectfully request the Court to deny the Petition for a writ of certiorari.

Respectfully submitted,

Samuel M. Millette
Attorney for Petitioner
DeLaney, Millette, DeArmon & McKnight, P.A.
801 East Trade Street
Suite 100, Civic Plaza
Charlotte, North Carolina 28202
Telephone: 704/372-9990

OF COUNSEL:

Ernest S. DeLaney, III
DeLaney, Millette, DeArmon & McKnight, P.A.
Suite 100, Civic Plaza
801 East Trade Street
Charlotte, North Carolina 28202
Telephone: 704/372-9990